United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6006

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

R. L. BLACK, ADA SMITH, JAMES BURKS, BEATRICE BURKS, SHANNON BAIRD, SHARON BAIRD, ALVIN BLACK, MARSHA BLACK, FURMAN G. RENTZ, MIGNONNE RENTZ, VINCENT SANFORD, ETHELINE SANFORD, LEE E. SIMIEN, LESLIE SMALL, SOLLA SMALL, ROY T. BLACK, GERTRUDE BLACK, NATHANIEL MONTGOMERY, TOMMIE MONTGOMERY, J. V. BLACK, GENNIE BLACK, on behalf of themselves and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, WILLIAM E. SIMON, Secretary of the Treasury, DONALD ALEXANDER, Commissioner, Internal Revenue Service, CHARLES BRENNAN, District Director, Internal Revenue Service, Brooklyn District, and other unknown agents of the Internal Revenue Service,

Defendants-Appellees.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS-APPELLEES

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-6006

R. L. BLACK, ADA SMITH, JAMES BURKS, BEATRICE BURKS, SHANNON BAIRD, SHARON BAIRD, ALVIN BLACK, MARSHA BLACK, FURMAN G. RENTZ, MIGNONNE RENTZ, VINCENT SANFORD, ETHELINE SANFORD, LEE E. SIMIEN, LESLIE SMALL, SOLLA SMALL, ROY T. BLACK, GERTRUDE BLACK, NATHANIEL MONTGOMERY, TOMMIE MONTGOMERY, J. V. BLACK, GENNIE BLACK, on behalf of themselves and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, WILLIAM E. SIMON, Secretary of the Treasury, DONALD ALEXANDER, Commissioner, Internal Revenue Service, CHARLES BRENNAN, District Director, Internal Revenue Service, Brooklyn District, and other unknown agents of the Internal Revenue Service,

Defendants-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS-APPELLEES

STATEMENT OF THE ISSUES PRESENTED

Whether the District Court correctly dismissed the plaintiffs' amended complaint (seeking both damages and injunctive relief against the defendants) and whether:

A. The plaintiffs failed to state a claim for alleged violations of their constitutional rights on which relief (damages) could be granted against the defendants, named and unnamed federal officials;

B. The plaintiffs' request for injunctive relief was barred by the Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

This is an appeal from the judgment entered pursuant to the memorandum and order of the United States District Court for the Eastern District of New York (Honorable Edward R. Neaher) dismissing the plaintiffs' complaint as amended and directing that judgment be entered in favor of the defendants. (R. 79a-89a.)[1/] The memorandum and order was filed on February 10, 1975, and is officially reported at 388 F. Supp. 805. Judgment was entered in accordance with the District Court's order on February 11, 1975. (R. B.) The plaintiffs timely filed a notice of appeal on March 6, 1975. (R. B.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

The facts of this case, as developed by the documents comprising the record on appeal, may be summarized as follows:[2/]

R. L. Black has been engaged in the business of preparing income tax returns since 1971 and has approximately 560 clients. Black and virtually all of his clients are black persons. (R. 2a, 3a, 58a.) In a letter of June 26, 1974, from an examination officer in his Internal Revenue Service district, Black was informed that certain power of attorney forms (permitting him to

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1/ "R." references are to the separately bound record appendix.

2/ Since the District Court granted the Government's motion to dismiss, the well-pleaded facts of the appellants' complaint are taken as true for purposes of this appeal.

represent various clients before the Internal Revenue Service) had been improperly completed and that certain income tax returns prepared by him and selected for audit were under a special joint investigation with the District's intelligence division. (R. 15a, 81a.) Some 120 of Black's clients were called for audits. (R. 59a.) Prior to these audits, approximately 85 of Black's clients were questioned about their dealings with him and six of these clients were summoned to appear with documents supporting the deductions claimed on income tax returns prepared by Black. (R. 59a.) More than 100 of his clients did not receive tax refund checks during this investigation.[3/] (R. 8, 59a.) Black later received a letter dated August 28, 1974, from the Regional Counsel's office for the North Atlantic Region of the Internal Revenue Service informing him that a recommendation for criminal prosecution of him was under consideration, and advising him that a conference would be afforded him (with or without counsel) at his request prior to such a recommendation. (R. 62a.)

On July 10, 1974, Black, acting on his own behalf, and certain of his clients, acting on their own behalf and on behalf of those "similarly situated" as clients of Black in a purported

3/ The District Court found that almost 200 of Black's clients received notices that all deductions claimed by them on their respective returns had been denied. (R. 82a.) This information was based on a letter sent to the District Court by plaintiffs' counsel which included a copy of one such notice that was sent to one of Black's clients. (R. 89a.) This letter is not in the record before this Court.

class action under Rule 23 of the Federal Rules of Civil Procedure, instituted the instant action in the District Court. (R. B.) The plaintiffs sought damages as well as injunctive and declaratory relief against the United States and certain of its executive officers, named and unnamed. As a basis for their cause of action, they asserted violations of their rights under the law quaranteed to them as black persons under 42 U.S.C., Section 1981 (invoking the District Court's jursidction under 28 U.S.C., Sec. 1343(4)) and violations of their Fourth, Fifth and Ninth Amendment rights under the Constitution of the United States (with jurisdiction under 28 U.S.C., § 1331) (see footnote 5, infra). (R. 2a). In support of their claims, the plaintiffs alleged that the investigation of Black's business was being conducted in bad faith as a result of the race of Black and his clients. (R. 9a.) Pertaining to Black, it was further alleged that the investigation constituted an attempt to drive him out of business in violation of his Fifth Amendment rights. (R. 9a-10a.) Pertaining to the named clients and their purported class, it was alleged that the conduct of the defendants constituted an "unnecessary examination" under Section 7605(b) of the Internal Revenue Code of 1954, and that the six summonses were illegally issued under Section 7602 of the Code, since they pertained exclusively to the investigation of Black's business and not to particular violations of the law by them, since the information sought in the summonses was already known to the Internal Revenue Service, and

since the summonses were overbroad and disproportionate to the end sought. (R. 9a-11a.) The clients and their purported class alleged further violations of their Fourth Amendment rights in that they were harassed by the visits of Internal Revenue Service personnel to their homes and places of work and by the scheduling of the office audits in places unreasonably far from their homes and places of business. (R. 10a-12a.)

The plaintiffs prayed that the District Court enter a declaratory judgment declaring the above-stated acts void and unconstitutional. (R. 12a-13a.) They likewise requested an injunction against any further such acts by the defendants. (R. 13a-14a.) Black sought damages of $250,000 to compensate for the injury to his business and reputation, and his named clients and their purported class likewise sought $250,000 in damages for the injuries suffered due to the defendants' illegal and unconstitutional acts. (R. 14a.)

In an amendment to their complaint filed on September 19, 1974, the plaintiffs alleged that the investigation of Black's business was prompted by his former mother-in-law, an employee of the Internal Revenue Service, in order to retaliate against him as a result of the dissolution of his marriage to her daughter. (R. 19a.)

On October 1, 1974, the plaintiffs filed a motion for a preliminary injunction in the course of which they stated that, pursuant to the business relationship between Black and his

clients, Black receives his clients' refund checks from the Internal Revenue Service and deducts his fee before forwarding the balance to his client. (R. 23a-24a.) It was further alleged that the defendants' withholding of these refund checks would cause irreparable damage to Black's business if not prohibited and that such actions violate the plaintiffs' due process rights under the Fifth Amendment. (R. 22a-24a.) Filed with this motion were a series of affidavits from certain of the plaintiffs delineating the circumstances described in this motion and in the original complaint. (R. 36a-60a.)

On October 1, 1974, the defendants filed a motion to dismiss the plaintiffs' original and amended complaints under Rule 12 of the Federal Rules of Civil Procedure on the grounds that the District Court lacked personal jurisdiction over the defendants, that it lacked subject matter jurisdiction, and that plaintiffs failed to state a claim upon which relief could be granted. (R. B. 65a-69a.)

On November 11, 1974, the District Court conducted a hearing on the plaintiffs' motion for preliminary injunction and on the defendants' motion to dismiss.[4/] (R. B., R. 79a-80a.) On February 10, 1975, the District Court filed its memorandum and order in which it dismissed the portion to the complaint seeking damages against all the defendants. (R. 79a-88a.) Also, the District Court ruled that the plaintiffs' action for injunctive relief was

4/ This hearing was devoted exclusively to legal argument by counsel.

barred by Section 7421(a) of the Internal Revenue Code of 1954. (R. 84a-86a.) Judgment for the defendants was entered pursuant to the District Court's order and the plaintiffs now appeal.[5/]

5/ The plaintiffs do not contest in this appeal the District Court's dismissal of the action as to the United States on jurisdictional grounds. The plaintiffs' cause of action for damages, if any, is based on violations of their Fourth and Fifth Amendment rights or on violations of 42 U.S.C., Section 1981. These causes of action are properly asserted only against individual governmental officers and not against the United States. Thus, neither these actions (and their jurisdictional counterparts, 28 U.S.C., §§ 1331, 1343) nor the other statutes asserted by the plaintiffs (Br. 3; R. 2a) constitute waivers of sovereign immunity so as to permit maintaining this action for damages against the United States. Morris v. United States, 521 F. 2d 872 (C.A. 9, 1975) (tort suit prohibited by 28 U.S.C., Section 2680(c); 28 U.S.C., Section 1346 does not constitute a consent to suit); Bray v. Elison, 75-2 U.S.T.C. par. 9643 (C.A. 10, 1974), cert. denied 43 U.S. Law Week 3209 (Sup. Ct., Oct. 15, 1974) (28 U.S.C., Section 1340 does not constitute a waiver of sovereign immunity).

SUMMARY OF ARGUMENT

Since the plaintiffs posit their cause of action for damages upon alleged violations by various officers of the Internal Revenue Service of their rights under the Fourth, Fifth and Ninth Amendments and under 42 U.S.C., Section 1981, it is fundamental that they must plead actions undertaken by the officers that constitute a violation of those rights and that have caused them injury, or else risk dismissal of their complaint. Further, the rights allegedly violated in this case are personal in nature, so a claim for damages may be asserted only by those individuals whose rights were assertedly violated.

The alleged infringements on constitutional and statutory rights in the instant case arose in the course of an investigation of Mr. Black's tax return preparation business, with the accompanying investigations into the correctness of some of his clients' income tax returns. Section 7602 of the Internal Revenue Code of 1954 gives the Internal Revenue Service broad authority to conduct investigations for the "purpose of ascertaining the correctness of any return" or for "determining the liability of any person for any internal revenue tax." It is apparent, then, that the Internal Revenue Service was authorized to investigate Mr. Black's tax return preparation business through an inquiry into the correctness of various of his clients' income tax returns. That such an investigation might have criminal implications for Mr. Black

does not establish it as a bad faith investigation. In any event, Mr. Black and his clients were entitled to resist the investigation. This would force the Internal Revenue Service to issue summonses in aid of its investigation and both the summoned party and Mr. Black could have made good faith challenges to the investigation before the hearing officer. Ultimately, the Government would have to seek judicial enforcement of the summonses under Section 7604(b) of the Code, at which time all of the allegations of bad faith (including the alleged harassment, the purported racial motives and the alleged desire to ruin Mr. Black's business) could have been resolved. The statutory procedures governing investigations outlined in the Internal Revenue Code are designed to protect the constitutional rights here in issue, but these procedures were not invoked in the instant case because, as the affidavits of certain of the client-plaintiffs reveal, Mr. Black's clients either consented to an interview in their home or, in a few instances, complied with summonses issued to them without challenge.

The client-plaintiffs also assert that their tax refunds were being improperly withheld. There is no statutory provision, however, which entitles a taxpayer to receive a refund within a given time period. These plaintiffs were entitled to file a claim for refund with the Internal Revenue Service and, after six months from such filing, commence a suit for a refund of the contested taxes paid. It is in such a proceeding that a taxpayer's right to a refund can be properly established.

It is clear, then, that the Internal Revenue Service had the statutory authority to conduct investigations into the correctness of the income tax returns of Mr. Black's clients, and that those affected by such investigations were afforded the legal mechanisms to challenge the motive behind the investigations, as well as to challenge the alleged improper withholding of refund checks. These statutory remedies are geared to protect the constitutional rights asserted by Mr. Black and his clients and were under no circumstances denied to them as black persons in violation of 42 U.S.C., Section 1981. Accordingly, the plaintiffs, by their conclusory allegations, failed to state a claim for damages based upon alleged violations of these rights.

Mr. Black argues in this appeal that the named and unnamed defendants should not be entitled to absolute immunity from suit because of the rule of qualified immunity for state officials in actions brought under 42 U.S.C., Section 1983 announced in Scheuer v. Rhodes, 416 U.S. 232 (1974). Whatever the impact that Scheuer may have on the immunity afforded federal officers who are not performing police-type functions, it is clear that under Scheuer any personal liability to be imposed upon a federal official must be founded upon his actions, and not based upon his vicarious liability as the head of an executive agency or office for acts allegedly performed on his behalf by unknown agents. In the instant case, the plaintiffs refer only to the general authority of the

Secretary of the Treasury, the Commissioner of Internal Revenue and the named District Director, and proceed to base their claim upon the alleged unconstitutional actions of certain agents of the Internal Revenue Service. These allegations fail to establish the requisite personal involvement by the named defendants in the alleged illegal activity so as to sustain the statement of a claim against them. In the absence of such allegations, these named defendants remain absolutely immune from civil damage suits under Barr v. Matteo, 360 U.S. 564 (1959).

The alleged unconstitutional actions of the "unnamed agents" include several statements by them purportedly indicating bad faith on their part in performing their duties, and the alleged retaliatory motives of Mr. Black's former mother-in-law in allegedly instigating the investigation. Such statements, in themselves, do not establish a violation of Mr. Black's rights. Moreover, whether Mr. Black suffered any present damages as a result of these actions is conjectural at best. The District Court, therefore, was correct in essentially holding that a person seeking to hold an Internal Revenue Service agent personally liable for alleged unconstitutional actions must allege in a meaningful way the harm perpetrated by the agent. This is consistent with the policy that underlies such an agent's traditional immunity from suit, which is to eliminate the constant threat of retaliation by vexatious lawsuits. While the cases following Scheuer v. Rhodes prescribe only a qualified immunity for federal officials, in each of those cases there was either a very clear exercise

on the part of the officials involved of a police-type function or an alleged pattern of abuse which purportedly caused the aggrieved parties very evident and present harm. In the instant case, however, the agents were not exercising law enforcement functions and the allegations in the record of present damages are inconclusive at best. Under these circumstances, the District Court correctly dismissed Mr. Black's amended complaint insofar as it sought damages against "unnamed agents."

The District Court also correctly ruled that it did not have jurisdiction of the plaintiffs' request for an injunction in that such relief is barred by the Anti-Injunction Act, Section 7421(a) of the Code. This statute is geared to protect the "process" of collecting taxes by satisfying the Government's need to assess and collect taxes with a minimum of pre-enforcement judicial interference. It is clear that the instant case very much involves the process of collecting taxes, inasmuch as the investigation at issue, while having potential criminal implications for Black, was necessarily aimed at determining the "correctness" of certain of his clients' tax returns and their individual tax liabilities. Accordingly, the Anti-Injunction Act is a complete bar to this relief unless the plaintiffs can satisfy the twofold exception to Section 7421(a) as stated in Enochs v. Williams Packing & Navigation Co.,

370 U.S. 1 (1962): (1) that equity jurisdiction exists, and (2) that under no circumstances can the Government ultimately prevail.

Although Mr. Black alleged that his business would suffer irreparable damage if the refund checks continued to be withheld, he and his clients were accorded adequate legal remedies at law under the circumstances of this case and thus failed to sufficiently allege that equity jurisdiction existed. The Supreme Court has very strongly reaffirmed that the refund suit constitutes an adequate legal remedy for those claiming the right to a refund, regardless of the nature of their challenge to the assessment. See, e.g., Bob Jones University v. Simon, 416 U.S. 725 (1974). Moreover, both Mr. Black and his clients were afforded adequate legal remedies within the Internal Revenue Code to challenge the legality of the investigation while it was being conducted. In Reisman v. Caplin, 375 U.S. 440 (1964), the Supreme Court described the statutory provisions governing Internal Revenue Service investigations as a "comprehensive procedure" providing a "full opportunity for judicial review."

Since both of the conditions in Williams Packing must be met to satisfy the judicially-created exception to the Anti-Injunction Act, and the plaintiffs failed to demonstrate that equity jurisdiction existed, their request for injunctive relief was, for that reason alone, properly denied. The plaintiffs

likewise failed to satisfy the second condition in Williams Packing, that under no circumstances could the Government ultimately prevail. As to the clients' potential refunds, there were no allegations concerning the basis on which any of the individual refund claims might be made. A fortiori, it was not demonstrated that "under no circumstances" could the Government ultimately prevail on the determination of their individual tax liabilities. Similarly, because the clients' civil tax liabilities were inextricably bound up in any investigation of Mr. Black's business, and because the investigatory acts in question occurred prior to any recommendation for criminal prosecution of Mr. Black, it could not be said that under no circumstances could the Government ultimately prevail on the question of whether a proper investigation was being conducted.

The judgment of the District Court is correct and should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE PLAINTIFFS' COMPLAINT AND ENTERED JUDGMENT FOR THE DEFENDANTS

A. The plaintiffs' complaint failed to state a cause of action for damages against the defendants for alleged violations of plaintiffs' rights

The plaintiffs posit their cause of action for damages upon violations by various officers of the Internal Revenue Service of the plaintiffs' rights under the Fourth, Fifth and Ninth Amendments of the Constitution of the United States, and, relying on 42 U.S.C., Section 1981, Appendix, infra, upon the denial to them as black persons of the "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." While the Supreme Court has held, in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), that a cause of action for damages exists against federal officers, involved in the police-type functions of arrest and search, for alleged violations of a person's Fourth Amendment rights occurring during the exercise of these functions, it is fundamental that persons seeking to hold federal officers personally liable for alleged violations of their constitutional or statutory rights must plead actions undertaken by such officers that constitute a violation of those rights, and that result in injury to those persons, or risk dismissal of their complaint. See Wheeldin v. Wheeler, 373 U.S. 647 (1963). Of course, the rights involved in this

case are personal in nature (see, e.g., United States v. Alderman, 394 U.S. 165, 174 (1969)), so a claim for damages may be asserted only by the individuals whose rights were violated. Thus, the alleged harm to Mr. Black differs from the alleged harm to his clients, each of whom must sufficiently allege that his rights have been violated.[6/] It is submitted that the plaintiffs' amended complaint failed to adequately state a cause of action against the defendants and was properly dismissed by the District Court.

The alleged infringements on constitutional and statutory rights in the instant case arose in the course of an investigation of Mr. Black's tax return preparation business with the accompanying

6/ The validity of the clients' class was not determined by the District Court under Rule 23(c)(1) of the Federal Rules of Civil Procedure. Of course, the burden was on the clients to demonstrate the necessity for their class action. Demarco v. Eden, 390 F. 2d 836, 845 (C.A. 2, 1968). Fairly read, the allegations on behalf of the clients (R. 5a) specify only that the defendants"acted and refused to act on grounds generally applicable to the class". Even assuming the validity of such a statement (which we do not admit), this allegation is sufficient only to establish grounds for declaratory and injunctive relief under Rule 23(b)(2), and not damages under either Rule 23(b)(1), or 23(b)(3). Thus, as to the portion of this suit seeking damages only the named client-plaintiffs are proper parties, and not all of Mr.Black's clients as a class.

investigations into the correctness of some of his clients' income tax returns. The clients make general allegations of harassment on the part of certain Internal Revenue Service agents by visting them in their homes and, in six cases, by issuing alleged unlawful summonses. (R. 6a-8a, 59a.) It is further alleged by the clients that their refunds were being wrongfully withheld. (R. 7a.) Mr. Black generally alleges that the investigation was intended to ruin his business and was being conducted either to discriminate against him as a black person, or as a result of a retaliatory motive on the part of his former mother-in-law, an employee of the Internal Revenue Service. (R. 9a, 19a.) While plaintiffs argue (Br. 9) that the allegations of their complaint must be liberally construed for purposes of the defendants' motion to dismiss, it is equally clear that these conclusory allegations of violations of their constitutional and statutory rights are insufficient to state a claim. See Albany Welfare Rights Org. Day Care Ctr., Inc. v. Schreck, 463 F. 2d 620 (C.A. 2, 1972), cert. denied, 410 U.S. 944 (1973); Robinson v. McCorkle, 462 F. 2d 111, 113 (C.A. 3, 1972). The plaintiffs' allegations of unlawful activity must, of course, be viewed in light of the legal framework under which this investigation was conducted.

Section 7602 of the Internal Revenue Code of 1954, Appendix, infra, gives the Internal Revenue Service the broadest possible authority to conduct investigations for the "purpose of ascertaining the correctness of any return" or for "determining the

liability of any person for any internal revenue tax." Only recently, the Supreme Court, in United States v. Bisceglia, 420 U.S. 141, 145-146 (1975), has emphasized the importance of this investigatory power to our self-reporting system of taxation. While recognizing that such investigations involve "some invasion of privacy"[7/], the Court was bolstered by the "substantial protection" that is afforded those subject to the investigation by Section 7604(b) of the Code, Appendix, infra, which permits enforcement of summonses (the ultimate investigatory tool) only by the courts. Indeed, even prior to a judicial proceeding, the Supreme Court has held in Reisman v. Caplin, 375 U.S. 440 (1964), that either the person summoned or any interested party may attack a summons before the hearing officer. And, if such claims are rejected, such officer must then seek judicial enforcement of the summons under Section 7604(b) of the Code. This legal structure is designed to protect the affected individual's Fourth and Fifth Amendment rights by curtailing the enforcement of a summons which is allegedly issued in bad faith, which is overbroad, or which constitutes an "unnecessary examination" under Section 7605(b) of the Code, Appendix, infra. United States v. Powell, 379 U.S. 48, 52-58 (1964). Where summonses are directed to persons who are not immediately subject to the investigation, the person under investigation may, under certain circumstances, intervene in the summons enforcement proceeding if he can demonstrate a "significantly protectable interest" under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Donaldson

7/ The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The plaintiffs couch their Ninth Amendment claims in terms of a violation of their

v. United States, 400 U.S. 517, 531-536 (1971). But it is undisputed that special agents of the Internal Revenue Service may conduct investigations, and issue summonses incident thereto, with both civil and criminal consequences. Couch v. United States, 409 U.S. 322, 326 (1973).

It is apparent, then, that the Internal Revenue Service is authorized to investigate Mr. Black's tax return preparation business. See United States v. Berkowitz, 488 F. 2d 1235 (C.A. 3, 1973), cert. denied, 421 U.S. 946 (1975); United States v. Turner, 480 F. 2d 272 (C.A. 7, 1973); Anderson v. Langenwalter, 74-1 U.S.T.C. par. 9417 (N.D. Iowa, 1974), aff'd unpublished order (C.A. 8, Dec. 30, 1974), cert. denied 421 U.S. 962 (1975); Jackson v. Wise, 385 F. Supp. 1159 (Utah, 1974). It is likewise unavoidable that in so doing the tax returns of Mr. Black's clients must be investigated and audited. This is clearly within the ambit of Section 7602, which permits an investigation for the "purpose of ascertaining the correctness of any return." That such an investigation might have criminal implications for Mr. Black does not establish it as a bad faith investigation. In any event, Mr. Black and his clients were entitled to resist the investigation. This would force the Internal Revenue Service to issue summonses in aid of its investigation and, under the

7/ (continued):
right of privacy. (R. 2a, 10a.) See Roe v. Wade, 410 U.S. 113, 152-155 (1973). The Bisceglia case, however, dispels the notion that an investigation under Section 7602 constitutes an impermissible invasion of an individual's right of privacy, and the judicial enforcement procedures in the Code constitute the legal safeguards to an affected individual's constitutional rights. See United States v. Union National Bank, 371 F. Supp. 763, 768-769 (W.D. Pa., 1974), aff'd, 506 F. 2d 1053 (C.A. 3, 1974).

reasoning of Reisman v. Caplin, supra, both the summoned party and Mr. Black could have challenged the summons before the hearing officer. Ultimately, the Government would have had to seek judicial enforcement of the summonses, at which time all of the allegations of bad faith (including the purported racial motives) could have been resolved. None of these procedures, however, were followed. In fact, the affidavits of Mr. Black's clients in support of their motion for preliminary injunction almost uniformly indicate that they either agreed to an interview at their home or complied with a summons issued to them. (R. 36a-37a, 38a, 45a, 49a, 54a.) As to the allegations that they were subjected to "repetitive" visits, these affidavits likewise demonstrate a normal pattern of a visit to their home (or on their job when they could not be reached at home), and, in a few instances, a summons following such an interview.[8/] Concerning the allegation that the summonses and audits were being conducted unreasonably far from their homes, it can hardly be said that such a circumstance takes on constitutional dimensions, particularly since only six of the clients were issued summonses and those audited were called to the Internal Revenue Service office only one time. Of course, the statutory and regulatory provisions governing the examination process permit employees of the Internal Revenue Service to fix the place for the interview. Section 7605(a) of the Code, Appendix, infra; Statement of Procedural Rules, Internal Revenue Service, § 301.7605-1(a), Appendix, infra.

8/ A departure from the pattern is cited by Mr. Black (R. 60a) concerning Furman Rentz, one of his clients. Mr. Rentz, however, stated that at the first interview by Internal Revenue Service agents a second interview was scheduled because the agents were pressed for time. Later a summons was issued to Mr. Rentz. (R. 36a-37a.)

The client-plaintiffs also assert (R. 7a, 11a) that their tax refunds were being improperly withheld. Again, there is no statutory provision which entitles a taxpayer to receive a refund within a given time period and, in fact, even if the refunds were made when desired, the Internal Revenue Service, upon subsequent audit, could assert a deficiency in taxes due from the taxpayers within the prescribed three-year period of limitations. Secs. 6212 and 6501 of the Code. In any event, as the District Court recognized (R. 86a), these plaintiffs were entitled to file a claim for refund with the Internal Revenue Service and, after six months from such filing, commence a suit for a refund of the contested taxes paid. Sections 6532 and 7422 of the Code, Appendix, infra. It is in such a proceeding that a taxpayer's right to a refund can be properly established. Accordingly, the law afforded Mr. Black and his clients the legal mechanisms in which to challenge the legality of and the motive behind the investigation of the returns as well as to challenge what they alleged to be in the improper withholding of refund checks. These statutory remedies are geared to protect the constitutional rights asserted by them and were under no circumstances denied to them as black persons under 42 U.S.C., Section 1981. It is clear, then, that they failed to state a sufficient claim for relief based upon alleged violations of these rights.

It is apparent from the foregoing discussion that Mr. Black's constitutional and statutory rights were not violated by an investigation of his tax return preparation business through the auditing of his clients' tax returns. In seeking damages against the defendants, however, Mr. Black alleges that the investigation of his business was designed to destroy his business and was motivated either on racial grounds or as a result of domestic acrimony (his former mother-in-law is an Internal Revenue Service employee). To substantiate his claim, he cites several statements by agents of the Internal Revenue Service. (R. 8a, 9a.) Also, on this appeal, (Br. 7), he argues that the named and unnamed defendants should not be entitled to absolute immunity from suit because of the rule of qualified immunity for state officials in actions brought under 42 U.S.C., Section 1983 announced in Scheuer v. Rhodes, 416 U.S. 232 (1974). Whatever the impact that Scheuer may have on the immunity afforded federal officers who are not performing police-type functions, in civil actions for damages brought against them for alleged violations of constitutional rights,[9/] it is clear under Scheuer

9/ In Scheuer (pp. 247-248) the Supreme Court fashioned a qualified, good faith immunity for state officials that is closely akin to the affirmative defense enunciated by this Court for federal narcotics agents in Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 456 F. 2d 1339 (1972). The rationale of Scheuer has been followed by several courts in cases involving federal officers. See, e.g., Apton v. Wilson, 506 F. 2d 83 (C.A. D.C., 1974) (damages action against, among others, the Attorney General of the United States and certain of his subordinates, for their alleged roles in the mass arrests stemming from the May Day demonstrations in 1971, where these officers participated in meetings concerning preparations for control of these demonstrations); Rowley v. McMillan, 502 F. 2d 1326 (C.A. 4, 1974) (damages action against, among others, officials of the Secret Service who directed security operations during a presidential visit to Charlotte, North Carolina); States

that any potential liability to be imposed upon a federal official for his alleged unconstitutional activity must be founded upon his actions, and not based upon his vicarious liability as the head of an executive agency or office for acts allegedly performed on his behalf by unknown agents. In Bivens, the federal narcotics agents who actually made the arrest were the defendants; and in Scheuer, the Governor of Ohio, among others, was a named defendant for his participation in the deployment of the Ohio National Guard. In describing the parties to this action (R. 6a), the plaintiffs refer only to the general authority of the Secretary of the Treasury, the Commissioner of Internal Revenue, and the named District Director. See Sec. 7801(a) of the Code, and Statement of Procedural Rules, § 601.101(a), Appendix, infra. Having stated the general authority of these defendants, Mr. Black further refers to them only in general or conclusory terms while founding his claim for damages on the alleged unconstitutional actions of certain agents of the

9/(continued):

Marine Lines, Inc. v. Shultz, 498 F. 2d 1146 (C.A. 4, 1974) (damages action against the Secretary of the Treasury and others for damages resulting from alleged undue delay in fulfilling a statutory duty to rule on a petition filed in accordance with federal customs laws). The Ninth Circuit has recently applied the qualified immunity rule in a case involving a tax return preparer who was under investigation by Internal Revenue Service Special Agents, who were alleged to have violated the plaintiff's Fifth, Sixth, and Eighth Amendment rights. Mark v. Groff, 521 F. 2d 1376 (1975). The Ninth Circuit, however, specifically declined to rule on the threshold question whether the complaint stated a cause of action for damages based on the alleged violations of constitutional rights. 521 F. 2d, pp. 1378-1379, fn. 1.

Internal Revenue Service. It is submitted that these allegations fail to establish the requisite personal involvement by the named defendants in the alleged illegal activity so as to sustain the statement of a claim against them.[10/] See David v. Cohen, 407 F. 2d 1268, 1270-1271 (C.A. D.C., 1969); Jackson v. Wise, supra.

In the absence of allegations in the complaint which demonstrate conduct on the part of the named defendants that is violative of Mr. Black's constitutional rights, the District Court correctly ruled that these defendants remain absolutely immune from civil damage suits. Barr v. Matteo, 360 U.S. 564, 571 (1959).[11/] (R. 84a.)

10/ Mr. Black does not allege a pattern of investigations by the Internal Revenue Service of the businesses of black tax return preparers that could arguably constitute a de facto policy to discriminate against such persons. See, e.g., Build of Buffalo, Inc. v. Sedita, 441 F. 2d 284, 288-289 (C.A. 2, 1971); Christian Echoes National Ministry, Inc. v. United States, 470 F. 2d 849, 857 (C.A. 10, 1972), cert. denied, 414 U.S. 864 (1973). The cases cited by Mr. Black (Br. 9-10) on the issue of qualified immunity involve at least some clear participation by the named defendants in the alleged unconstitutional abuses. See Mark v. Groff, Apton v. Wilson, Rowley v. McMillan, and States Marine Lines, Inc. v. Shultz, as described in footnote 9, supra. In Pelayo v. Rosenberg (C.A. 9, No. 74-3255), the Ninth Circuit, acting in an unpublished memorandum entered on September 22, 1975, vacated the District Court's dismissal of a complaint against district directors of the Internal Revenue Service and of the Immigration and Naturalization Service with no explanation of the personal involvement of those directors in the alleged unconstitutional activity.

11/ While the District Court couched its decision in this respect on jurisdictional grounds, it is likewise apparent that the complaint failed to state a claim against the named defendants.

The alleged actions of the "unnamed agents" which purportedly violated Mr. Black's Fifth Amendment rights include a statement by an Internal Revenue Service agent that the Internal Revenue Service was going to run Mr. Black out of business (R. 8a) and by a named agent's questioning Mr. Black as to whether he had any white clients (this agent was not named as a defendant). (R. 9a.) Mr. Black also asserts that his former mother-in-law instigated this investigation. (R. 19a.)

Of course, such statements, in themselves, do not establish a violation of Mr. Black's constitutional rights. Moreover, the District Court (R. 87a) found that any harm to Mr. Black resulting from these alleged abuses was conjectural, since it was unclear from his allegations whether he had suffered any present damages.[12/] To effectively rule that a person seeking to hold an Internal Revenue Service agent liable for damages for alleged unconstitutional actions must allege in a meaningful way the harm perpetrated by the agent is consistent with the policy that underlies such an agent's traditional immunity

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12/ Mr. Black contests this finding by the court below (Br. 19), but his statement in the complaint (R. 12a) that his business and reputation had already suffered "irreparable injury" as a result of the investigation is controverted by his later representation to the court that an injunction against the alleged withholding of his clients' refund checks would prevent such irreparable damage. (R. 24a) In his affidavit in support of the motion for preliminary injunction (filed almost two months after his complaint (R. B.)), Mr. Black states again that his business would be irreparably injured without the requested injunction. (R. 60a.) Between the filing of his complaint (in which a preliminary injunction was requested) and his motion for preliminary injunction, Mr. Black's clientele remained at 560. (R. 2a, 58a.)

from suit.[13] That policy is, of course, to eliminate the constant threat of retailiation by vexatious lawsuits, involving minimal or questionable injury, against Internal Revenue Service agents whose duties involve frequent contact with the public, often in an adversary role. See, e.g., Barr v. Matteo, supra; Gregoire v. Biddle, 177 F. 2d 579 (C.A. 2, 1949), cert. denied, 339 U.S. 949 (1950).

Mr. Black again relies (Br. 7) on Scheuer v. Rhodes and its progeny to establish the principle that these agents enjoy only a qualified immunity from actions for damages based on alleged violations of constitutional rights. In each of the cases cited to extend the Scheuer rule to federal officers, there was either a very clear exercise on the part of those officials of a police-type function,[14] recognized by this Court in Bivens as a common law exception to the absolute immunity of executive officials (456 F. 2d, p. 1346), or an alleged pattern of abuses which purportedly caused the aggrieved parties very evident and present

13/ See Berberian v. Gibney, 75-1 U.S.T.C. par., 9452 (C.A. 1, 1975); Kotmair v. Gray, 505 F. 2d 744 (C.A. 4, 1974); Sowders v. Damron, 457 F. 2d 1182 (C.A. 10, 1972); Anderson v. Langenwalter, supra.

14/ Apton v. Wilson, supra, involved mass arrests stemming from the May Day demonstrations in Washington, D.C., in 1971. Rowley v. McMillan, supra, involved crowd control measures exercised by Secret Service agents in conjunction with local police. But cf. Gallella v. Onassis, 487 F. 2d 986 (C.A. 2, 1973).

harm.[15/] In the instant case, the agents were not even allegedly exercising law enforcement functions since their investigation of Mr. Black's business involved ascertaining the correctness of certain of his clients' income tax returns and their tax liabilities incident thereto. These are purely civil investigative functions under Section 7602 of the Code, Appendix, infra. Moreover, the present damages alleged in this case are, at best, inconclusive, based on Mr. Black's conflicting allegations in his complaint (in which damages and injunctive relief were sought) and in his motion for preliminary injunction (see footnote 12, supra). Under these circumstances, the District Court correctly dismissed Mr. Black's complaint insofar as it sought damages against the unnamed agents.

15/ States Marine Lines, Inc. v. Schultz, supra, involved the seizure and holding of almost $30,000 worth of property subject to forfeiture under federal customs laws. Mark v. Groff, supra, involved an alleged loss of $80,000 in income and the destruction of Mr. Mark's tax return preparation business.

B. The plaintiffs' request for injunctive relief, is barred by the Anti-Injunction Act

The District Court correctly ruled that it did not have jurisdiction of the plaintiffs' request for an injunction[16] in that such relief is barred by the Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code of 1954, which provides, in pertinent part:

> * * * No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

In Bob Jones University v. Simon, 416 U.S. 725, 736 (1974), the Supreme Court stated that the principal purpose of this statute is to protect the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference. This is consistent with the traditional notion that the Anti-Injunction Act is geared to protect the "process" of collecting taxes. State Railroad Tax Cases, 92 U.S. 575, 613 (1875). Likewise, the language of Section 7421(a)

16/ The plaintiffs do not appeal the District Court's denial of declaratory relief. (R. 85a.) 28 U.S.C., Section 2201, Appendix, infra, creates general jurisdiction for district courts to grant declaratory judgments; but that statute likewise contains a specific exception for matters relating to federal taxes. This exception is at least as broad as the Anti-Injunction Act. See Bob Jones University v. Simon, 416 U.S. 725, 732-733, fn. 7 (1974).

("no suit * * * shall be maintained * * * by any person") spells a broad prohibition against injunctions with respect to the process of collecting an individual's own taxes or the taxes of others. See Bob Jones University v. Simon, supra, p. 738; Alexander v. "Americans United" Inc., 416 U.S. 752, 760 (1974); Cattle Feeders Tax Committee v. Shultz, 504 F. 2d 462, 464 (C.A. 10, 1974); Tax Analysts and Advocates v. Shultz, 74-2 U.S.T.C. par. 9602 (D. D.C., 1974), aff'd, 512 F. 2d 992 (C.A. D.C., 1975).

It is clear that the instant case very much involves the "process" of collecting taxes. Although the investigation being conducted had potentially criminal implications for Mr. Black, the interviews, summonses and audits of his clients were necessarily aimed at determining the "correctness" of their returns and their individual tax liabilities.[17/] These, of course, are several of the stated conditions for the exercise of the Internal Revenue Service's investigatory power under Section 7602 of the Code, Appendix, infra. It is, of course, evident that the determination of the correctness of a taxpayer's return and his ultimate tax liability are the prerequisites to the proper assessment and collection of his taxes. Unquestionably,

17/ The plaintiffs incorrectly assert (Br. p. 12) that the involvement of special agents of the Internal Revenue Service's Intelligence Division makes an investigation exclusively criminal in nature. Indeed, the Supreme Court has recognized that there is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. Donaldson v. United States, supra., p. 530.

then, the literal terms of Section 7421(a) are applicable to the activity sought to be enjoined by the plaintiffs. Accordingly, the Anti-Injunction Act is a complete bar to this relief[18] unless the plaintiffs can satisfy the two fold exception to Section 7421(a) as stated in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1(1962): (1) equity jurisdiction exists, and (2) under no circumstances can the Government ultimately prevail.

Although Mr. Black asserted that his business would suffer irreparable harm if the Internal Revenue Service did not cease its alleged withholding of his clients' refund checks since, pursuant to certain powers of attorney granted him by his clients,

18/ The plaintiffs cite (Br. 17-18) Eastern Kentucky Welfare Rights Org. v. Simon, 506 F. 2d 1278 (C.A. D.C., 1974), cert. granted, 421 U.S. 975 (1975), McGlotten v. Connally, 338 F. Supp. 448 (D. D.C., 1972), and Green v. Connally, 330 F. Supp. 1150 (D. D.C., 1971), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971), as cases where Section 7421(a) was held inapplicable. These cases involve challenges by nontaxpayers to the Internal Revenue Service's ruling policies governing tax-exempt organizations. While the Government is challenging the stated inapplicability of Section 7421(a) in Eastern Kentucky Welfare Rights Org. v. Shultz, supra, in the Supreme Court (Nos. 74-1110, 74-1124), these cases are clearly distinguishable from the instant case which directly involves the determination of the client-plaintiffs' tax liabilities.

he received their refund checks and deducted his fees from them (R. 22a-24a), he and his clients were accorded adequate remedies at law under the circumstances of this case and thus failed to show that equity jurisdiction existed. As the court below recognized (R. 86a), the clients could file individual claims for refund and, after six months, sue for those refunds in the appropriate District Court under Sections 6532(a)(1) and 7422(a) of the Code. Despite the possible delays incumbent upon such a process, the Supreme Court has very strongly reaffirmed that the refund suit constitutes an adequate legal remedy for those claiming the right to a refund, regardless of the nature of their challenge to the assessment. See Bob Jones University v. Simon, supra, pp. 746-747; Alexander v. "Americans United" Inc., 416 U.S. 752, 761-762 (1974); United States v. Americans Friends Service Com., 419 U.S. 7, 11 (1974). Moreover, both Mr. Black and his clients were afforded adequate legal remedies to challenge the good faith of the investigation while it was being conducted. In Reisman v. Caplin, supra, the Supreme Court ruled that the requirement of judicial enforcement of the summons power under Section 7604 of the Code, Appendix, infra, provides sufficient legal protection for all interested parties.[19/] Of course, in the instant case many of

19/ The cases cited by the plaintiffs (Br. pp. 13-14) to demonstrate limitations on the investigatory power under Section 7602 involve these very summons enforcement proceedings of which the plaintiffs herein did not avail themselves.

Mr. Black's clients voluntarily submitted to interviews with Internal Revenue Service personnel; but six of them refused to cooperate voluntarily and were then summoned to testify. (R. 8a.) The Reisman case recognizes that the witness himself or an interested party may make a good faith challenge before the hearing officer.[20/] No such challenges were made in the instant case, so the judicial enforcement proceedings, at which Mr. Black might have been able to intervene (see Donaldson v. United States, supra), were unnecessary. But this does not diminish the adequacy of the legal remedy itself which the Court describes as a "comprehensive procedure" providing a "full opportunity for judicial review." Reisman v. Caplin, supra, p. 450.

Because both of the conditions of Enochs v. Williams Packing & Navigation Co., supra, must be met to satisfy the judicially-created exception to the Anti-Injunction Act (see Alexander v. "Americans United" Inc., supra, p. 758) and the plaintiffs failed to demonstrate that equity jurisdiction existed because of the inadequacy of the legal remedies, their request for injunctive relief was, for that reason alone, properly denied by the District Court. The plaintiffs, however, also

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20/ The penal powers contained in Sections 7210 and 7604(b) of the Code apply only to contumacious refusals to comply with a summons and not to good faith challenges properly asserted. See Reisman v. Caplin, supra, pp. 446-449.

failed to satisfy the second Williams Packing condition, that under no circumstances could the Government ultimately prevail. As to the clients' potential refunds, there was no evidence presented concerning the basis on which any of the individual refund claims might be made. A fortiori, it was not demonstrated that "under no circumstances" could the Government ultimately prevail on the determination of their tax liabilities. Similarly, because the clients' civil tax liabilities were inextricably bound up in any investigation of Mr. Black's business, and because the investigatory acts in question occurred prior to any potential recommendation for criminal prosecution of Mr. Black (R. 62a), it could not be said that under no circumstances could the Government ultimately prevail on the question of whether a proper investigation was being conducted. See Donaldson v. United States, supra; United States v. Powell, supra. Indeed, as has been shown, the appropriate legal procedures for challenging the constitutional or statutory validity of the investigation were not utilized by the taxpayers. As the District Court correctly recognized (R. 86a), the constitutional nature of the plaintiffs' claims, as distinct from their probability of success on the merits, is of no consequence under the Anti-Injunction Act. Alexander v. "Americans United" Inc., supra, p. 759.

CONCLUSION

For the reasons stated above, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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JANUARY, 1976.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on counsel for the plaintiffs-appellants by mailing four copies thereof on this _____ day of January, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

Thomas Hoffman, Esquire
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_____
GILBERT E. ANDREWS,
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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6532. PERIODS OF LIMITATION ON SUITS.

(a) Suits by Taxpayers for Refund.--

(1) [as amended by Sec. 89(b), Technical Admendments Act of 1958, P.L. 85-866, 72 Stat. 1606] General rule.--No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

* * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

* * *

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court.--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) [as amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87, Sec. 208 (d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374, 387, Sec. 202 (c)(4), Excise Tax Reduction Act of 1965, P. L. 89-44, 79 Stat. 136, and Sec. 207(d)(9), Airport and Airway Development Act of 1970, P. L. 91-258, 84 Stat. 219] Enforcement.--Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

SEC. 7605. TIME AND PLACE OF EXAMINATION.

(a) [as amended by Sec. 4(i), Act of April 2, 1956, supra, Sec. 208 (d)(4), Highway Revenue Act of 1956, supra, Sec. 202 (c)(4), Excise Tax Reduction Act of 1965, supra, and Sec. 207(d)(9), Airport and Airway Development Act of 1970, supra] Time and Place.--The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority

of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421(f)(2), or 6424(d)(2), or 6427(e)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) Restrictions on Examination of Taxpayer.--No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

* * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) No Suit Prior to Filing Claim for Refund.--No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * *

SEC. 7801. AUTHORITY OF DEPARTMENT OF THE TREASURY.

(a) Powers and Duties of Secretary.--Except as otherwise expressly provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury.

* * *

28 U.S.C.:

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Revised Statutes:

Sec. 1977 Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(42 U.S.C. § 1981.)

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301. 7605-1 Time and place of examination.

(a) Time and place. The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), or 7602 shall be such time and place as may be fixed by an officer or employee of the Internal Revenue Service and as are reasonable under the circumstances. In the case of a summons under authority of section 7602(2) and § 301.7602-1, or under the corresponding authority of section 6420(e)(2) or 6421(f)(2), the date fixed for appearance before an officer or employee of the Service, shall not be less than 10 days from the date of summons.

* * *

Statement of Procedural Rules, Internal Revenue Service (26 C.F.R.):

§ 601.101 Introduction.

(a) General. The Internal Revenue Service is a bureau of the Department of the Treasury under the immediate direction of the Commissioner of Internal Revenue. The Commissioner has general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue. The Internal Revenue Service is the agency by which these functions are performed. Within an internal revenue district the internal revenue laws are administered by a district director of internal revenue.

* * *

TX-156 (Ed. 8-29-72)

CASE NO. 75-6006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

..... Term, 19....

R. L. BLACK, ET AL.

Plaintiffs-Appellants

vs.

UNITED STATES OF AMERICA,

Defendants-Appellees

The Clerk will enter our appearances as Counsel for the Defendants-Appellees

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